

ASSOCIATED INDUSTRIES OF VERMONT

REPRESENTING THE VERMONT INDUSTRIAL AND BUSINESS COMMUNITY SINCE 1920

August 27, 2010

Susan Hudson
Clerk, Public Service Board
112 State Street, 4th Floor
Montpelier, VT 05602

RE: Docket No. 7533 -- Implementation of Standard Offer Prices for Sustainably Priced Energy Enterprise Development ("SPEED") Resources

Dear Ms. Hudson:

In order to provide comments as requested in the Board's memorandum of August 5, AIV has reviewed the FERC decision as well as a number of the many publically and readily available press reports and legal and policy commentaries and analyses that have followed. This review has raised a number of serious concerns about Vermont's feed-in tariff program.

The following excerpts are provided simply to highlight such concerns:

"This decision is likely to be viewed as setting strict limits on the power of the States attempting to follow the lead of California and Vermont by prescribing wholesale prices for environmentally favorable forms of electric energy."¹

"In all events, the [FERC] order raises questions about the continued lawfulness of certain existing programs . . ."²

"California and Vermont have established feed-in-tariffs and a number of others states have initiated or announced plans for feed-in-tariffs"

This is the first time FERC has addressed feed-in tariffs, and it has been reported that Chairman Wellinghoff said that this order represents precedential thinking on how, in the context of PURPA, FERC will rule on feed-in tariff disputes.

While signaling to states how feed-in tariffs can be structured consistent with Federal law, FERC's order also places limitations on state programs by limiting them to QFs. For example:

- Purchase rates are restricted to the purchasing utility's "avoided costs," thereby limiting incentives that may be included in those rates

[M]arket participants and states seeking guidance on how to craft feed-in-tariffs that do not run afoul of federal law as interpreted by FERC should review this order carefully."³

Based on our preliminary review to date, it appears clear that Vermont's feed-in tariff program violates federal law to the extent, at a minimum, prices set under the program exceed avoided costs. The Vermont program might violate federal law to a greater and more fundamental degree, but we do not attempt to speak to any clear conclusions regarding that possibility here.

¹ "FERC Issues First Major Ruling on Compatibility of State Feed-in Tariffs with Applicable Federal Energy Law". David Yaffe, Howard Shapiro, Van Smith. Van Ness Feldman. <http://www.vnf.com/news-alerts-489.html>

² "FERC's Feed-in Tariff Order Addresses State/Federal Conflict in Renewables Area". Andrew McLain. Bracewell & Giuliani LLP. August 17, 2010. http://www.martindale.com/energy-law/article_Bracewell-Giuliani-LLP_1118918.htm

³ "FERC Issues Precedential Ruling on California's Feed-In Tariff and FERC Staff Presents Smart Grid Process Recommendations." William Massey, Robert Fleishman, Bud Early. Covington & Burling LLP. July 29, 2010.

<http://www.cov.com/publications/?pubtype=7&archiveyear=2010>

AIV submits that it is incumbent upon the Board to take the following actions:

First: The Board should impose a moratorium on the signing of any new contracts under this program. It appears clear that the current Vermont program under which existing contracts were signed violates federal law. In light of this apparent violation, the continued and increased cost to Vermont ratepayers that would result from any additional contracts, and even the financial jeopardy that developers could face as any outstanding legal questions and consequences are resolved, the only prudent, fair, and responsible first step would appear to be such a moratorium. Indeed, even just the recognition of the serious possibility of federal violations and the mere risk of foreseeable possible consequences strongly support this first step.

Second: The Board should seek a timely determination by FERC on the full extent to which Vermont's program and underlying statutes violate and are preempted by federal statutes and regulations. As noted above, it appears clear that Vermont's program does violate federal law at least with regard to avoided costs; however, a FERC determination as to the full extent of the Vermont program's violations is important for ensuring that all appropriate and necessary actions are taken to bring Vermont's program into federal compliance, if possible.

Third: The Board should move to commence proceedings aimed at addressing the Vermont program's apparent violations of federal law. Such proceedings could involve a number of questions, and it might be necessary to seek comment on the full range of issues that will have to be addressed. At a minimum, however, it would appear that issues requiring attention include altering the prices under the current program, as well as other impacted program elements, so as not to exceed avoided costs and to otherwise comply with federal law, and determining the fate of existing contracts.

There are a range of possible outcomes regarding existing contracts, perhaps including having to void them, changing prices going forward, and establishing a mechanism for Vermont ratepayers' recovery of costs that have exceeded federal limitations. AIV cannot at this time speak to preferred outcomes, but clearly Board proceedings to determine appropriate outcomes are necessary.

AIV does not believe that the commencement of such proceedings should be postponed pending a FERC determination as discussed in our second action called for above. Even if the likely outcome of such a determination did not appear as clear as it does, it is in the interest of all stakeholders -- including both ratepayers and developers -- that these issues are resolved in as timely a manner as possible. Given how long such proceedings might take, it is in the interest of stakeholders to begin sooner rather than later. The extent to which the timing of a FERC determination should influence details in the scheduling of specific issues or stages in such Board proceedings can be addressed in initial comment periods.

AIV would like to conclude these comments by emphasizing the gravity of this situation. Vermont's feed in tariff program is already harming Vermont ratepayers by imposing excessive costs that violate long-standing principles and policies of responsible ratemaking seeking to minimize costs and protect ratepayer welfare. Now it appears clear -- as, frankly, it should have occurred to those responsible for the creation and implementation of this program in the first place -- that this harm is being done to ratepayers in violation of federal law. These considerations alone argue strenuously for taking this issue very seriously and acting expeditiously.

AIV appreciates the opportunity to comment on this serious matter. Please do not hesitate to contact us if you have any questions.

Sincerely,

William Driscoll
Vice President

cc: service list